

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE LATESE WOMACK,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 254007

Wayne Circuit Court

LC No. 03-005553-01

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to life imprisonment for the felony murder conviction, thirteen to twenty years' imprisonment for the home invasion conviction, and 3-1/3 to 5 years' imprisonment for the felon in possession conviction, those sentences to be served concurrently, but consecutive to a two-year term of imprisonment for the felony-firearm conviction. The trial court vacated defendant's second-degree murder conviction. Defendant appeals as of right. We affirm.

I. Instruction on Accidental Shooting

Defendant argues the trial court erred in denying his request to instruct the jury that an accidental shooting is a defense to voluntary manslaughter. We agree that the trial court erred in denying the requested instruction. *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). But this case is distinguishable from *Hess*, because defendant was not convicted here of voluntary manslaughter, but rather of two forms of murder and the jury was instructed that accident was a defense to each theory of murder. Specifically, the jury was instructed that the killing was not murder if the gun went off accidentally.

The omitted accident instruction is properly classified as a nonconstitutional error. *People v Hawthorne*, 265 Mich App 47, 53 n 3; 692 NW2d 879 (2005). Applying the standard for preserved, nonconstitutional error, we hold that reversal is not warranted because it is not more probable than not that the instructional error was outcome determinative. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002); cf. *People v Morris*, 139 Mich App 550; 362

NW2d 830 (1984). Rather, the jury necessarily rejected defendant's accident theory by finding him guilty of first-degree felony murder and second-degree murder, notwithstanding the trial court's instructions that accident was a defense to these offenses.

II. Prosecutorial Misconduct

Defendant next argues that reversal is required because of two instances of prosecutorial misconduct. We disagree for the reason that defendant has not established any misconduct that, singularly or cumulatively, deprived him of a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

A. Standard of Review

An appellate court reviews claims of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). If the issue was not preserved by a timely and specific objection, this Court reviews for plain error affecting defendant's substantial rights. *People v Moorer*, 262 Mich App 64, 78; 683 NW2d 736 (2004).

B. Analysis

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test is whether defendant was denied a fair and impartial trial. *Bahoda*, *supra* at 266-267; *Abraham*, *supra*.

1. "Death Penalty" Remarks

Defendant preserved his challenge to the prosecutor's "death penalty" remarks by timely objection. References to possible penalty or the disposition of an accused after the verdict are improper in order to prevent the jury from deciding a case on the basis of facts unrelated to the defendant's guilt or innocence. *In re Spears*, 250 Mich App 349, 352; 645 NW2d 718 (2002). Here, examined in context, it is apparent that the prosecutor's argument was not directed at the possible penalty for defendant, but instead an attempt to portray defendant, based on the evidence, as a person who took the law into his own hands by executing the victim after his girlfriend's daughter accused the victim of sexually molesting her. In this context, the prosecutor's reference to the lack of a death penalty in Michigan was not so inflammatory that it created a risk that the jury would convict defendant on some basis other than the evidence. Further, any prejudice was cured by the trial court's cautionary instruction that the jury was not to consider the possible penalty. *Abraham*, *supra* at 279.

2. Shifting Burden of Proof

On appeal, defendant claims that the prosecutor's comments, that defendant failed to show that the victim had sexually assaulted defendant's girlfriend's daughter, improperly shifted the burden of proof by indicating that defendant had an obligation to present such evidence.

Defendant did not object to the prosecutor's rebuttal remarks about the sexual molestation, but rather raised a challenge to the remarks in a motion for mistrial after the jury

was excused from the courtroom. Even then, however, defendant did not argue that prosecutor's remarks shifted the burden of proof. To properly preserve a claim of prosecutorial misconduct, a defendant must timely and specifically object. *Moorer, supra*. Defendant failed to preserve this claim.

Examining the prosecutor's remarks in context, we find no plain error. The prosecutor did not suggest that defendant had to prove anything, but rather, consistent with the prosecutor's other arguments, suggested that defendant took the law into his own hands by killing an accused sexual molester. Moreover, even if there was plain error, it was cured when the trial court instructed the jury that "the prosecutor must prove each element of the crime beyond a reasonable doubt. The defendant is not required to prove his innocence or to do anything." Therefore, defendant's substantial rights were not affected by the prosecutor's challenged remarks.

III. Evidence that Defendant Appeared on "Michigan's Most Wanted"

Defendant argues that a police investigator's testimony that defendant appeared on "Michigan's Most Wanted" was irrelevant, and denied him a fair trial. At trial, defense counsel raised this issue by objecting to the testimony on the basis of relevancy, and the trial court decided the issue, overruling defendant's objection. We conclude this issue is sufficiently preserved for review. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

A. Standard of Review

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

B. Analysis

The trial court did not abuse its discretion in allowing testimony that defendant appeared on "Michigan's Most Wanted." Defendant's act of fleeing after the shooting was admissible evidence of flight because it supports an inference of "consciousness of guilt." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Although defendant being featured on "Michigan's Most Wanted" did not by itself have a tendency to support an inference that defendant hid during the three-month period after the offense, it was part of the search that closely preceded defendant's conduct of turning himself in to the police. Thus, the evidence was relevant, and the prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *Bahoda, supra* at 291. Here, we cannot conclude that the trial court abused its discretion in allowing evidence that a police investigator used "Michigan's Most Wanted" to attempt to locate defendant.

IV. Exclusion of Provocation Evidence

Defendant argues that he was deprived of his right to present a defense and his right to a fair trial by the trial court's rulings to exclude evidence of statements made in defendant's

presence by both his girlfriend's daughter and another teenaged child, Sherrell, accusing the victim of sexually molesting them.¹

A. Standard of Review

We review the trial court's evidentiary rulings for an abuse of discretion, but consider any questions of law bearing on the trial court's decision de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

B. Analysis

A criminal defendant has a state and federal constitutional right to a fair trial. *People v Kirby*, 440 Mich 485, 494; 487 NW2d 404 (1992). Also, a criminal defendant has a state and federal constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Defendant first argues the trial court improperly excluded testimony that:

. . . when Sherrell told [defendant's girlfriend] that she believed that [defendant's girlfriend's daughter] was molested because [the victim] had done the same thing to her, that my client was present during that conversation when [Sherrell] told that to [defendant's girlfriend].

The trial held that evidence relating to whether, in fact, sexual molestation occurred, was not relevant, and therefore excluded the evidence.

We agree with defendant that the above evidence would have been relevant to establishing his state of mind. A statement offered to establish its effect on the hearer may be relevant and admissible, subject to the trial court's discretion to exclude relevant evidence under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See *People v Fisher*, 449 Mich 441, 449-453, 537 NW2d 577 (1995). "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. . . . [T]he provocation must be adequate, namely, that which would cause a reasonable person to lose control." *Hawthorne, supra* at 58, quoting *People v Sullivan*, 231 Mich App 510, 518, 586 NW2d 578 (1998). Here, the effect that the excluded statements had on defendant is relevant to establishing whether defendant was sufficiently provoked to lose control.

¹ Because a defendant may not leave it to this Court to search for a factual basis to sustain or reject his position, our review of this issue is limited to the two evidentiary rulings cited in defendant's argument. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

However, we nonetheless conclude that the trial court did not abuse its discretion in excluding the evidence. The record reflects that the evidence was not offered for the limited purpose of establishing defendant's state of mind. Rather, defense counsel indicated that the evidence was offered to, in defense counsel's words, establish that, "in fact, sexual molestation occurred." Therefore, the trial court did not abuse its discretion in excluding evidence regarding whether molestation, in fact, occurred.²

Moreover, even if the limited purpose of the evidence, proving defendant's state of mind, was apparent from "the context within which the questions was asked," MRE 103(a)(2), defendant has not established that reversal is required. Officer Thomas testified that defendant stated the following, in part, after he turned himself in:

Then Shanell [Hicks] started talking about what she has heard about what [the victim] had done to other girls in the family. Sharrell, . . . , was telling me and [defendant's girlfriend] that [the victim] did that to her and either her sister or cousin, and that they can't be around [the victim]. So now, I'm mad and I'm cursing at my girl, asking her why did you let her go over there if you knew he was like that. She said that this was the first time that she heard of this.

Shanell [Hicks] called back and told [defendant's girlfriend] that [the victim] was on his way to bring the kids over to our house. Now, I'm walking around the house, smoking square after square. I was mad at him, [the victim's] girlfriend, [the victim's] grandmother. I was just think [sic] that this would never happened if her grandmother had been watching her like she was supposed to, and that [defendant's girlfriend's daughter] had to go through this.

Further, at trial, defendant's girlfriend testified that:

Defense Counsel. You testified when you got off the phone with Chanel Hicks you noticed that [Sherrell] . . . was crying, is that correct?

Defendant's girlfriend. Yes.

Defense Counsel. And what was [Sherrell] saying why she was crying?

Defendant's girlfriend. She said I believe [defendant's girlfriend's daughter], . . . because he did it to me when I was ten.

² The trial court's rejection of the evidence for this purpose was correct. Whether the victim, in fact, sexually molested children had no tendency to make the existence of a fact of consequence to the charges against defendant more or less probable. MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000).

<i>Defense Counsel.</i>	She said I believe?
<i>Defendant's girlfriend.</i>	[defendant's girlfriend's daughter]?
<i>Defense Counsel.</i>	She said I believe [defendant's girlfriend's daughter] because of what?
<i>Defendant's girlfriend.</i>	[The victim] did it to [Sherrell] when she was ten.
<i>Defense Counsel.</i>	That's what [Sherrell] said when she was crying?
<i>Defendant's girlfriend.</i>	Yes.
<i>Defense Counsel.</i>	And [defendant] was standing there near you when [Sherrell] said that, is that correct?
<i>Defendant's girlfriend.</i>	Yes.

The proffered evidence would merely have been cumulative to the other evidence regarding defendant's state of mind. Therefore, even assuming the trial court erred in excluding the evidence, defendant was not denied a fair trial. Further, because this evidence provided a similar, if not the same, foundation from which defense counsel could argue that defendant lacked the state of mind to commit murder, defendant was not deprived of the right to present a defense.

Defendant argues along similar lines that the trial court improperly excluded the testimony of defendant's girlfriend's daughter that she told defendant that the victim had molested her.

On the first day of trial, defense counsel initially requested defendant's girlfriend's daughter testify to having been molested by the victim, and that she told defendant she had been molested by the victim just before the shooting. The trial court took the matter under advisement. Defense counsel later renewed the request that she testify, adding that, "Because I heard in the opening argument made by [the prosecutor], I took very careful notes, to the effect that well, it's just a mere allegation as to whether the sexual molestation occurred." The trial court denied the request. After the close of the prosecutor's proofs, defense counsel asked the trial court to reconsider its decision regarding defendant's girlfriend's daughter testifying at trial. Defense counsel added that her testimony would corroborate defendant's statements. The trial court affirmed its previous ruling.

The trial court did not abuse its discretion in excluding testimony from defendant's girlfriend's daughter. For reasons that the previous evidence of statements made in defendant's presence by Sherrell was relevant to establish defendant's state of mind, this evidence is likewise relevant. However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

The trial court indicated that it “felt that the testimony of [defendant’s girlfriend’s daughter] would not add or detract from what was necessary to show in terms of a reasonable period of time that defendant had to give thought and reflection to his actions.” Further, the trial court found that her testimony would inflame the passion of the jury against the victim. We agree with the trial court that this evidence would be cumulative to other evidence already presented, and that it would potentially confuse or mislead the jury into believing that the victim, and not defendant, was on trial. Therefore, we conclude that the trial court did not abuse its discretion in excluding this evidence as unduly prejudicial. Moreover, for the same reasons that exclusion of statements made in defendant’s presence by Sherrell did not deprive defendant of his right to present a defense and his right to a fair trial, we conclude that reversal is not required by the trial court’s excluding the testimony of defendant’s girlfriend’s daughter.

V. Conclusion

Although not raised on appeal, we note that defendant was charged with first-degree home invasion as the predicate felony for the first-degree felony murder charge. He was convicted and sentenced on both charges. Convictions of both felony murder and the underlying felony offend double jeopardy protections. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). When a defendant is erroneously convicted of both felony murder and the underlying felony, the proper remedy is to vacate the conviction and sentence for the underlying felony. *Id.* Because defendant was convicted and sentenced for both felony murder and the underlying felony of first-degree home invasion, his conviction and sentence for first-degree home invasion must be vacated. We affirm in all other respects.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette